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13 Attorneys for Plaintiffs,
14 CAROL CHANG, as Conservator and
15 Guardian Ad Litem of LISA CHANG

16 SUPERIOR COURT OF CALIFORNIA
17 COUNTY OF SAN FRANCISCO

18 CAROL CHANG, as Conservator and Guardian)
19 Ad Litem of LISA CHANG,)
20 Plaintiffs,)
21 vs.)
22 MASSACHUSETTS MUTUAL LIFE)
23 INSURANCE COMPANY; DAVE JONES,)
24 COMMISSIONER OF THE DEPARTMENT)
25 OF INSURANCE OF THE STATE OF)
26 CALIFORNIA; and DOES 1-20, inclusive,)
27 Defendants.)

Case No. CGC-16-554087

NOTICE OF ENTRY OF ORDER

28 PLEASE TAKE NOTICE that on December 11, 2017, the Honorable Judge Harold Kahn
entered an order granting plaintiff's motion for summary adjudication on the first two issues; denying
on the third issue; and denying defendant's motion for summary judgment or, in the alternative,
summary adjudication on all six issues.

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1 Attached hereto as **Exhibit A** is a true and correct copy of the Court's Order.

2 Dated: December 12, 2017

PILLSBURY & COLEMAN, LLP

3
4 By: 

5 Terrence J. Coleman
6 Ryan H. Opgenorth
7 Rudy Tap
8 Attorneys for Plaintiff,
9 Carol Chang
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EXHIBIT A

1 Terrence J. Coleman (State Bar No. 172183)
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13 Attorneys for Plaintiff and Cross-Defendant,
14 CAROL CHANG, as Conservator
15 and Guardian Ad Litem of LISA CHANG

16 SUPERIOR COURT OF CALIFORNIA
17 COUNTY OF SAN FRANCISCO

18 CAROL CHANG, as Conservator and Guardian
19 Ad Litem of LISA CHANG,

20 Plaintiff,

21 v.

22 MASSACHUSETTS MUTUAL LIFE
23 INSURANCE COMPANY; DAVE JONES AS
24 COMMISSIONER OF INSURANCE; and
25 DOES 1-20, inclusive,

26 Defendants.

27 AND RELATED CROSS-ACTION.
28

FILED

Superior Court of California
County of San Francisco

DEC 11 2017

CLERK OF THE COURT

BY: [Signature]
Deputy Clerk

Case No. CGC-16-554087

[PROPOSED] ORDER:

- (1) GRANTING PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION ON THE FIRST TWO ISSUES, DENYING ON THE THIRD ISSUE; AND
- (2) DENYING DEFENDANT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION ON ALL SIX ISSUES

Action Filed: September 6, 2016
Trial Date: December 11, 2017

1 Plaintiff's Motion for Summary Adjudication against Defendant Massachusetts Mutual Life
2 Insurance Company ("MassMutual"), and Defendant MassMutual's Motion for Summary Judgment or,
3 in the Alternative, Summary Adjudication both came on regularly for hearing before this Court on
4 November 17, 2017. Supplemental briefing was allowed on the cross-motions, which were then taken
5 under submission by the Court. After reviewing the moving, opposition, reply papers and supplemental
6 briefing, and considering the arguments of counsel, the Court hereby ORDERS as follows:

7 **Plaintiff's Motion**

8 The Court grants Plaintiff's motion for summary adjudication as to Issue Nos. 1 and 2, and
9 denies the motion as to Issue No. 3.

10 With respect to Issue No. 1, Plaintiff seeks summary adjudication on MassMutual's first cause
11 of action for declaratory relief on the ground that MassMutual is precluded from rescinding the policy.
12 The Court finds that Plaintiff is entitled to summary adjudication on the grounds that MassMutual is
13 precluded from rescinding the policy as a matter of law.

14 MassMutual offered three grounds to rescind: Misrepresentations in questions 1(e), and the
15 request to provide full details for the "yes" answer to question 3(o), and the telephone interview.

16 Pursuant to California Insurance Code 10350.2, after the two-year contestability period, only
17 fraudulent misstatements made in the applications are bases to rescind. Therefore, any fraudulent
18 misstatements in the telephone interview, which was not part of the application, are not a basis to
19 rescind. (Plaintiff's Undisputed Fact Nos. 29, 30)

20 Question 1(e), and to the extent that the request to provide full details is construed to seek
21 information beyond prescribed medication and physician information, violates Insurance Code Section
22 10232.3, subdivision (a).

23 To the extent the request to provide full details is construed only to seek prescribed medication
24 and physician information, Section 10232.3(a) bars rescission for any failure to provide that
25 information. (Plaintiff's Undisputed Fact No. 6)

26 Therefore, as discussed at the hearing, the dispositive issue, which is the legal issue for which
27 the parties provided supplemental briefing, is whether an insurer can rescind after the contestability
28 period for fraudulent misstatements made in a response to a question that violates Section 10232.3,

1 subdivision (a).

2 Both sides acknowledge there is no authority on point. The Court concludes that,
3 notwithstanding that there is no language in the Insurance Code explicitly precluding rescission for
4 fraudulent misstatements in response to a question not permitted by Section 10232.3(a), an insurer may
5 not rescind a policy after the contestability period based on a response to a question that is barred by
6 Section 10232.3(a).

7 The absence of explicit language barring rescission is not dispositive. The legislative purposes
8 of strictly limiting grounds for rescission after the contestability period and strictly prescribing
9 permissible questions in an application for long-term care insurance would be undermined by allowing
10 an insurer to rescind after the contestability period based on a response to an impermissible question.

11 The second issue for which Plaintiff sought summary adjudication was that MassMutual had a
12 duty to pay Facility Confinement Benefits without a reservation of rights to seek reimbursement. The
13 Court grants summary adjudication in favor of Plaintiff. The Court finds that MassMutual has such a
14 duty.

15 MassMutual's only basis to avoid paying policy benefits or to give a reservation of rights was its
16 asserted grounds to rescind or possible grounds to rescind. (Plaintiff's Undisputed Fact Nos. 105, 106)
17 The Court has determined that MassMutual may not as a matter of law rescind the policy.

18 The third issue for which Plaintiff seeks summary adjudication cannot be granted because it
19 seeks summary adjudication of an issue other than the issue of duty which does not dispose of an entire
20 cause of action. It is therefore not within the Court's purview under Code of Civil Procedure section
21 437c.

22 It seeks by its own terms summary adjudication that MassMutual breached the contract. Breach
23 is an element, not the entire claim. There was no effort to seek summary adjudication as to the entire
24 claim; specifically, no effort to seek summary adjudication as to damages.

25 **Defendant's Motion**

26 The Court hereby denies MassMutual's motion for summary judgment and adjudication as to all
27 issues, Nos. 1-6, in its entirety.

28 MassMutual seeks summary adjudication on the cause of action asserted by Ms. Chang for

1 breach of contract because MassMutual did not breach the policy. That is denied.

2 There is a triable dispute whether MassMutual breached the policy by paying benefits under
3 reservation of rights to later seek reimbursement. (Plaintiff's Additional Fact Nos. 54, 55) Payment of
4 full policy benefits with a reservation of rights to later seek reimbursement precludes liability for breach
5 of contract only when it was reasonable and in good faith for the insurer to so condition the payment of
6 benefits.

7 Here there is a triable dispute because, one, there was no legal basis or there is no legal basis for
8 MassMutual to rescind the policy. (*See above*) And two, Plaintiff has presented facts that show that
9 MassMutual did not reasonably and in good faith condition payment of benefits, because it knowingly
10 took the risk of issuing a policy in the face of serious concerns about Lisa Chang's mental and physical
11 health; and then after the contestability period and when it received a claim, it decided to investigate the
12 claim based on circumstances which it could and should have done prior to issuance of the policy.
13 (Plaintiff's Additional Fact Nos. 13-23, 37-40)

14 The second issue for which MassMutual seeks summary adjudication is that the insurance bad
15 faith claim fails because MassMutual has not withheld benefits due under the policy. That issue is
16 denied because withholding benefits under a policy is not the only basis for the claimed bad faith by the
17 Plaintiff. And an insurer can be liable for bad faith even when it pays full benefits if, as contended here,
18 it unreasonably delayed payment of policy benefits or engaged in unreasonable investigation or
19 insurance handling practices. (Plaintiff's Additional Fact Nos. 31-56, 59-60, 71-84, 87-90)

20 The third issue is identical to the second issue. It seeks summary adjudication of the insurance
21 bad faith claim because MassMutual has not withheld policy benefits for a reason that was unreasonable
22 or without proper cause. It assumes that there can be no bad faith liability even when full policy
23 payments are made. And as the Court has stated, there is a claim otherwise here in this case with regard
24 to delay of policy benefits and engaging in unreasonable investigation. And as a matter of law, if it was
25 determined that there was unreasonable delay or unreasonable investigation, such conduct can amount
26 to actionable insurance bad faith even when all benefits have been paid.

27 Issue four seeks summary adjudication of the bad faith claim on the grounds that there is a
28 genuine dispute regarding MassMutual's coverage liability.

1 The Court denies summary adjudication on that issue on the grounds that there is a triable
2 dispute whether there is a genuine dispute regarding MassMutual's liability. The Court has already
3 determined that MassMutual as a matter of law could not rescind the policy. Facts seen in light most
4 favorable to the Plaintiff show that MassMutual did not act reasonably and in good faith by
5 conditioning benefits subject to a right of later reimbursement.

6 Issue five by MassMutual in the Court's view is identical to issue four. It seeks summary
7 adjudication of the bad faith claim on the grounds that MassMutual's conduct was reasonable. For the
8 same reasons noted above, there is a triable issue as to the reasonableness of MassMutual's conduct.

9 Issue six seeks summary adjudication of the punitive damages request. There is a triable dispute
10 as to whether MassMutual acted maliciously or oppressively within the meaning of Civil Code Section
11 3294. When viewing the facts most favorably to the Plaintiff, MassMutual issued a policy which it had
12 significant doubts about, decided not to conduct an investigation, and only long after the contestability
13 period had expired, it chose to conduct the very investigation it could have before, after it had received
14 a claim by Ms. Chang. (Plaintiff's Additional Fact Nos. 13-23, 31-56, 59-60, 71-84, 87-90)

15 IT IS SO ORDERED.

16
17 Dated: 12/1/17


18 Hon. Judge Harold Kahn
19 San Francisco Superior Court
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1 **PROOF OF SERVICE**

2 *Chang v. Mass Mutual Life Ins. Co., et al.*

3 STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO:

4 I, the undersigned, declare that I am a citizen of the United States; my business address is The Transamerica
5 Pyramid, 600 Montgomery Street, 31st Floor, San Francisco, California 94111; I am employed in the City and County of
6 San Francisco; I am over the age of eighteen (18) years and not a party to the within action.

7 On December 12, 2017, I served the foregoing document(s) described as:

8 **NOTICE OF ENTRY OF ORDER**

9 on the interested party(ies) in this action by electronic transmission via One Legal on the recipients designated on the
10 Transaction Receipt located on the One Legal website.

11 **THE DOCUMENTS WERE ALSO SERVED BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered
12 by **MARK WADE**, an employee of Pillsbury & Coleman, LLP, by hand on the same day, addressed to the interested
13 party(ies) at the address(es) set forth below.

14 Linda B. Oliver
15 Nicholas J. Boos
16 **MAYNARD COOPER & GALE, LLP**
17 600 Montgomery Street, Suite 2600
18 San Francisco, CA 94111
19 Tel. 415-646-4707

Attorneys for Defendant
Massachusetts Mutual Life Insurance Company
(BY E-SERVICE AND PERSONAL SERVICE)

(BY E-SERVICE ONLY)

20 Jeffrey M. Grantham – *pro hac vice* 4/25/17
21 **MAYNARD, COOPER AND GALE, P.C.**
22 1901 6th Avenue North
23 2400 Regions/Harbert Plaza
24 Birmingham, Alabama 35203
25 Tel. 205-254-1035
26 Fax 205-254-1999

27 **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true
28 and correct.

Executed on December 12, 2017, at San Francisco, California.

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